Techno Asia Holding Bhd v Mount Austin Properties Sdn Bhd

HIGH COURT (JOHOR BAHRU) — COMPANIES WINDING UP NO 28–102 OF 2004
GHAZALI CHA JC
14 SEPTEMBER 2006

Civil Procedure — Set off — Availability — Right to set off for liquidated damages for late delivery against balance of purchase price — Company in liquidation — Whether undue preference

Companies and Corporatioans — Winding up — Liquidators — Application for directions — Company in liquidation was a housing development company — Application for stakeholders for the company in liquidation to release stakeholder sums — Sum retained was 5% of purchaser price intended to be a 'defect liability period

The liquidator of the respondent company filed an application for directions as well as for orders to compel Messrs TS Chong & Co, Advocates & Solicitors, to disclose the amount of money that they are holding as stakeholders for the respondent company ('stakeholder sums') and to release the stakeholder sums with interest to the liquidator. The respondent company was a housing development company. There was a standard clause, which required five percent (5%) of the purchase price to be held by a stakeholder for a period of 18 months from the date vacant possession of the house was delivered to the purchaser. This 18 months period was intended to be a 'defect liability period' where if the developer failed to repair, part of the 5% of purchaser price held by the stakeholder could be ordered by a court to be used to pay for the repairs. Messrs TS Chong & Co were the solicitors appointed to be stakeholders for some of the houses sold by the respondent company. Messrs TS Chong & Co took the stand that they could not release the stakeholder sums held by them to the liquidator because some purchasers are making a claim against the respondent company. According to counsel for the liquidator, all the houses had been delivered to the purchasers by August 2001, which meant that the 18 months defect liability period for all the houses had expired, by the latest, March 2003. The liquidator also exhibited many confirmation letters signed by the purchasers to prove that those purchasers who reported defects had confirmed that the defects had been repaired.

Held:

(1) The liquidator is an officer appointed by this court and he may apply to this court for directions because his actions are subject to the supervision of this court (see s 237(3) Companies Act 1965 ('the Act')). He is not a director or a shareholder with vested interest in the respondent company. It was wrong of

Messrs TS Chong & Co to regard the liquidator as if he is a director of the respondent company. Section 233(1) of the Act imposed a duty on the liquidator to take custody of all assets of the company in liquidation, which in this case includes all the stakeholders sums held by Messrs TS Chong & Co as well as all fixed deposit interests earned. Messrs TS Chong & Co should have released the fixed deposit interest information requested as well as the stakeholders sums to the liquidator, and then submit their bills for legal fees to the liquidator to ask for payment as a creditor (see paras 6–7).

(2) As for the right to set off by purchasers who still owe balance of purchase price for the houses and would like to deduct what they calculated as liquidated damages for late delivery, it is necessary to examine the right of set off in this case. If a company is not in liquidation, the issue of undue preference of creditors does not arise at all. Its directors are free to agree to set off debts with its creditors and debtors. If a company is in liquidation, the law controls what may be set off. The effect of s 7A of the Housing Developers (Control And Licensing) Act 1966 is that all the stakeholders sums held by Messrs TS Chong & Co are monies paid by purchasers that must go into a Housing Development Account for the benefit of all the purchasers (see paras 8 & 10).

(3) In order to achieve a fair result and to protect all purchasers equally without any undue preference, the liquidator must be directed to collect the balance purchase price in full from all purchasers who purchased houses from the respondent company and not to allow any set off. He is to transfer all the purchase monies received, including the stakeholders sums collected into a special account similar to a Housing Development Account. The monies in this account shall be utilised to pay off expenses and professional fees directly related to the development of those houses sold to those purchasers. The liquidator is also authorised to utilise the monies in this account to pay his fees to act as liquidator of the respondent company. The balance monies in this account at the end of the liquidation process are to be distributed pro-rata to those purchasers who are entitled to liquidated damages for late delivery of their houses (see para 11).

[Bahasa Malaysia summary

Penyelesai syarikat responden memfailkan satu permohonan untuk arahan-arahan dan juga perintah-perintah untuk mewajibkan Tetuan TS Chong & Co, untuk menyatakan jumlah wang yang dipegang oleh mereka sebagai pemegang amanah harta untuk syarikat responden ('jumlah pemegang amanah harta') dan melepaskan jumlah pemegang amanah harta bersama dengan faedah kepada penyelesai. Syarikat responden adalah sebuah syarikat pembangunan perumahan. Terdapat satu klausa biasa, yang menghendaki lima peratus (5%) harga belian dipegang oleh pemegang amanah harta untuk jangkamasa 18 bulan dari tarikh penyampaian milikan kosong rumah tersebut kepada pembeli. Jangkamasa 18 bulan ini adalah bertujuan untuk satu 'tempoh liabiliti kecacatan' di mana sekiranya pemaju gagal membaiki, sebahagian 5% harga belian yang dipegang oleh pemegang amanah harta dapat diperintahkan oleh mahkamah untuk digunakan untuk membayar pembaikan tersebut. Tetuan TS Chong & Co adalah peguamcara yang dilantik sebagai pemegang

amanah harta untuk beberapa daripada rumah-rumah yang dijual oleh syarikat responden. Tetuan TS Chong & Co mengambil pendirian bahawa mereka tidak boleh melepaskan jumlah pemegang amanah harta yang dipegang oleh mereka kepada penyelesai oleh kerana beberapa pembeli-pembeli telah membuat tuntutan terhadap syarikat responden. Mengikut peguamcara penyelesai, kesemua rumah-rumah telah disampaikan kepada pembeli-pembeli pada Ogos 2001, yang bermakna bahawa 18 bulan tempoh liabiliti kecacatan untuk kesemua rumah-rumah tersebut telah pun luput, yang terakhir, Mac 2003. penyelesai juga melampirkan ekshibit surat-surat pengesahan yang ditandatangani oleh pembeli-pembeli yang membuktikan bahawa pembeli-pembeli yang mengadu tentang kecacatan telah mengesahkan bahawa kecacatan tersebut telah diperbaiki.

Diputuskan:

(1) Penyelesai adalah pegawai yang dilantik oleh mahkamah ini dan beliau boleh memohon kepada mahkamah ini untuk arahan-arahan oleh kerana tindakannya adalah tertakluk kepada pengawasan mahkamah ini (lihat s 237(3) Akta Syarikat 1965 (Akta tersebut)). Beliau bukannya seorang pengarah ataupun pemegang saham dengan satu kepentingan di syarikat responden. Ia adalah salah untuk Tetuan TS Chong & Co untuk menganggap penyelesai seperti beliau seorang pengarah syarikat responden. Seksyen 233(1) Akta tersebut memperuntukkan satu kewajipan atas penyelesai untuk memperolehi kesemua aset-aset syarikat dalam likuidasi tersebut, di mana dalam kes ini termasuk kesemua jumlah pemegang amanah harta yang dipegang oleh Tetuan TS Chong & Co dan juga kesemua faedah simpanan tetap yang didapati. Tetuan TS Chong & Co sepatutnya melepaskan maklumat faedah simpanan tetap yang diminta dan juga jumlah pemegang amanah harta kepada pelikuidasi, dan kemudiannya menyerahkan bil-bil untuk yuran guaman mereka kepada penyelesai untuk meminta bayaran sebagai pemiutang (lihat perenggan 6–7).

(2) Berhubung dengan hak kepada penolakan oleh pembeli-pembeli yang masih berhutang baki harga belian untuk rumah-rumah tersebut dan hendak menolak apa yang mereka katakan sebagai ganti rugi tertentu atas kelewatan hantar-serah, adalah perlu untuk meneliti hak penolakan dalam kes ini. Sekiranya syarikat tersebut tidak berada dalam likuidasi, isu keutamaan yang tidak wajar pemiutang-pemiutang langsung tidak berbangkit. Pengarah-pengarahnya adalah bebas untuk bersetuju menolak hutang-hutang dengan pemiutang-pemiutang dan penghutang-penghutangnya. Sekiranya syarikat tersebut berada dalam likuidasi, undang-undang mengawal apa yang dapat ditolak. Kesan s 7A Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ialah bahawa kesemua jumlah pemegang amanah harta yang dipegang oleh Tetuan TS Chong & Co adalah wang yang dibayar oleh pembeli-pembeli dan seharusnya dimasukkan ke dalam Akaun Pembangunan Perumahan untuk faedah kesemua pembeli-pembeli (lihat perenggan 8 & 10).

(3) Untuk mencapai keputusan yang adil dan melindungi kesemua pembeli-pembeli bersama-sama tanpa sebarang keutamaan yang tidak wajar, penyelesai harus diarahkan untuk mengumpulkan kesemua baki harga belian

sepenuhnya daripada kesemua pembeli-pembeli yang membeli rumah-rumah tersebut daripada syarikat responden dan tidak membenarkan sebarang tolakan. Beliau dikehendaki memindahkan kesemua harga belian yang diterimanya, termasuk jumlah pemegang amanah harta yang diterimanya ke satu akaun khas yang menyerupai Akaun Pembangunan Perumahan. Wang daripada akaun ini akan digunakan untuk membayar perbelanjaan dan yuran profesional yang berkait secara langsung kepada pembangunan rumah-rumah yang dijual kepada pembeli-pembeli. penyelesai juga dibenarkan menggunakan wang di dalam akaun tersebut untuk membayar yurannya sebagai penyelesai kepada syarikat responden. Baiki wang di dalam akaun tersebut selepas berakhir proses likuidasi tersebut akan dibahagikan secara mengikut bahagian tertentu kepada pembeli-pembeli yang berhak kepada ganti rugi tertentu atas hantar-serah lewat rumah-rumah mereka (lihat perenggan 11).]

Notes

For cases on availability, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2250–2251.

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1056–1087.

Legislation referred to

Companies Act 1965 ss 224, 237(3), 233(1)
Companies (Winding Up) Rules 1972 r 163
Housing Developers (Control And Licensing) Act 1966 s 7A

T Gan (Gan & Lim)for the petitioner.
PC Lee (PC Lee & Associates) for the liquidator.
Norliza (KC Chong with her) (TS Chong & Co) for the stakeholder.

Ghazali Cha JC:

[1] The respondent company Mount Austin Properties Sdn Bhd was on 26 April 2005 ordered to be wound-up by this court through a winding up order made by my predecessor Kang Hwee Gee J. The said order also appointed a private liquidator, namely Mr Tee Siew Kai, to be the liquidator of the respondent company.

[2] The present application filed by the liquidator is for directions as well as for orders to compel Messrs TS Chong & Co, Advocates & Solicitors, to disclose the amount of money that they are holding as stakeholders for the respondent company ('stakeholder sums') and to release the stakeholder sums with interest to the liquidator.

[3] Counsel for Messrs TS Chong & Co raised the question as to whether this court is the right court to be hearing the liquidator's application. The answer to this question is to be found in the Companies (Winding Up) Rules 1972. Rule 163 provides that the court that ordered the winding up of the company, ie,the winding up court shall have power to hear all pending matters brought by or against the

company. As the court that issued the winding up order, this court was the 'winding up court' where the respondent company is concerned. The rationale for the said r 163 in directing all proceedings regarding a respondent company to be heard by the winding up court is to prevent duplicity of proceedings and also because the winding up file contains all affidavits and other cause papers that had been filed. In other words, the winding up court has a complete record of the winding up proceedings and is in the best position to give directions concerning the company that it had ordered to be wound-up. I therefore hold that this court, being the winding up court, is the most suitable court to hear the liquidator's application.

[4] The background facts leading to the liquidator coming back to this court for directions are as follows. The respondent company was a housing development company. As a housing developer, the standard Sale and Purchase Agreements used to sell houses to purchasers contain the standard clause, which required five percent (5%) of the purchase price to be held by a stakeholder for a period of 18 months from the date vacant possession of the house was delivered to the purchaser. This 18 months period was intended to be a 'defect liability period'. If the purchaser discovered any defect in the house during the 18 months period and notified the developer about it, the developer had to repair the defect. If the developer failed to repair, part of the 5% of purchaser price held by the stakeholder could be ordered by a court to be used to pay for the repairs. Messrs TS Chong & Co were the solicitors appointed to be stakeholders for some of the houses sold by the respondent company.

[5] Messrs TS Chong & Co took the stand that they could not release the stakeholder sums held by them to the liquidator because some purchasers are making a claim against the respondent company. A study of the letters exchanged between the parties, as exhibited in the affidavits filed, show that the alleged claims made by some purchasers who wrote to Messrs TS Chong & Co were for liquidated damages for late delivery of their houses and not for any defects in the buildings during the 18 months period. According to Counsel for the liquidator, all the houses had been delivered to the purchasers by August 2001, which meant that the 18 months defect liability period for all the houses had expired, by the latest, March 2003. The liquidator also exhibited many confirmation letters signed by the purchasers to prove that those purchasers who reported defects had confirmed that the defects had been repaired. It is clear that those amounts of 5% purchase price held by the stakeholders were part of the purchase price paid by the purchasers to the developer, ie the respondent company. Messrs TS Chong & Co should have released all the stakeholders sums to the respondent company when they were asked to do so by the Special Administrator in March 2003 when the respondent company was under special administration by Danaharta. It is true that the respondent company could not be sued while it was under special administration by Danaharta but that certainly did not prevent Messrs TS Chong & Co from applying to court for directions if they had any doubt. Applying for directions and suing for payment are two completely different types of proceedings. Instead, Messrs TS Chong & Co appeared to have kept the stakeholders money in their accounts and paid themselves legal fees by using the money that they are supposed to hold on trust as stakeholders.

[6] The other point that must be highlighted is that the liquidator is an officer appointed by this court and he may apply to this court for directions because his actions are subject to the supervision of this court (see s 237(3) Companies Act 1965). He is not a director or a shareholder with vested interest in the respondent company. It was wrong of Messrs TS Chong & Co to regard the liquidator as if he is a director of the respondent company. Section 233(1) of the Companies Act 1965 reads:

> Where a winding up order has been made or a provisional liquidator has been appointed, *the liquidator* or provisional liquidator *shall take into his custody* or under his control *all the property* and things in action to *which the company* is or appears to be *entitled.*

[7] This section imposed a duty on the liquidator to take custody of all assets of the company in liquidation, which in this case includes all the stakeholders sums held by Messrs TS Chong & Co as well as all fixed deposit interests earned. Messrs TS Chong & Co should have released the fixed deposit interest information requested as well as the stakeholders sums to the liquidator, and then submit their bills for legal fees to the liquidator to ask for payment as a creditor. This is because Messrs TS Chong & Co were not solicitors instructed by the liquidator. They were appointed as stakeholders prior to liquidation. Justice shall be done to order them to release all the Stakeholders Sums they received as stakeholders together with all fixed deposit interests that they received without penalising them with additional interest or costs. They must, however, return to the liquidator all the money that they have deducted from the stakeholders Sums as their fees.

[8] Since there are purchasers who still owe balance of purchase price for the houses they bought and would like to deduct what they calculated as liquidated damages for late delivery from the balance purchase price, it is necessary to examine the right of set off in this case. If a company is not in liquidation, the issue of undue preference of creditors does not arise at all. Its directors are free to agree to set off of debts with its creditors and debtors. If a company is in liquidation, the law controls what may be set off. However, the respondent company in this case is a housing developer. This means I have to consider the Housing Developers (Control And Licensing) Act 1966 to decide this issue.

[9] Section 7A of the Housing Developers (Control And Licensing) Act 1966 was a section in the Act designed to protect purchasers. It reads:

> Section 7A.
>
> (1) Subject to subsection (9), every licensed housing developer shall open and maintain a Housing Development Account with a bank or finance company for each housing development undertaken by the licensed housing developer;
>
> (2) ...;
>
> (3) The licensed housing developer shall pay into the Housing Development Account of a housing development the purchase monies received by the licensed housing developer from the sale of housing accommodation in the housing development and any other sum or sums of money which are required by regulations made under this Act to be paid into the Housing Development Account.

(4) ...;

(5) Subject to subsection 6 (b), all monies in the Housing Development Account shall, notwithstanding any other written law to the contrary, be deemed not to form part of the property of the licensed housing developer in the event —

(a) the licensed housing developer enters into any composition or arrangement with his creditors or has a receiving order or an adjudication order made against him; or

(b) the licensed housing developer, being a company, goes into voluntary or compulsory liquidation.

(6) Upon the happening of any of the event referred to in subsection (5) —

(a) the monies in the Housing Development Account shall vest in the official receiver, trustee in bankruptcy or liquidator as the case may be, to be applied for all or any of the purposes for which monies in the Housing Development Account are authorised by regulations made under this Act to be withdrawn; and

(b) any money remaining in the Housing Development Account, after all payments have been made pursuant to paragraph (a) and all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled, shall be held by the official receiver, trustee in bankruptcy or liquidator as the case may be, as money belonging to the licensed housing developer to be applied in accordance with the law relating to bankruptcy of or the winding up of a company.

[10] The effect of the said s 7A is that all the stakeholders sums held by Messrs TS Chong & Co are monies paid by purchasers that must go into a Housing Development Account for the benefit of all the purchasers. If all purchasers paid their purchase in full to the liquidator, the liquidator would be able to pay out the same percentage of liquidated damages for late delivery of houses to all purchasers who are entitled to receive liquidated damages. All purchasers would receive pro-rata, the same percentage of their claim for liquidated damages for late delivery. Pro-rata in this case means equal percentage for all purchasers. What would happen if some purchasers are allowed to set off the balance of their purchase price by deducting liquidated damages from the amount they owe the respondent company? The result would be that the total amount deposited into the liquidation account would be less. This result would be most unfair because most purchasers would have paid their purchase price in full but getting a smaller percentage of their liquidated damages while some purchasers would end up getting paid 100% of liquidated damages by deducting it directly from the money they owed the respondent company.

[11] In order to achieve a fair result and to protect all purchasers equally without any undue preference, the liquidator must be directed to collect the balance purchase price in full from all purchasers who purchased houses from the respondent company and not to allow any set off. He is to transfer all the purchase monies received, including the Stakeholders Sums collected into a special account similar to a Housing Development Account. The monies in this account shall be utilised to pay off expenses and professional fees directly related to the development of those houses sold to those purchasers. The liquidator is also authorised to utilise the monies in this account to pay his fees to act as liquidator of the respondent company. This is fair, bearing in mind that the liquidator is an officer of this court and without him to act

professionally in liquidating the respondent company, the purchasers would probably never be able to receive a single sen of liquidated damages. The balance monies in this account at the end of the liquidation process are to be distributed pro-rata to those purchasers who are entitled to liquidated damages for late delivery of their houses.

[12] As the liquidator is seeking directions from this court and I have noticed the presence of an application filed within this same winding up file to try to garnish money belonging to the respondent company, I must point out s 224 of the Companies Act 1965:

> Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up by the court shall be void.

[13] This means that execution proceedings, including garnishee proceedings commenced after the filing of the winding up petition in this case are void. The judgment creditors must queue together with other unsecured creditors for the liquidator to deal with their claims. The exception to this rule is a company that is in voluntary winding up whereby the directors and/or shareholders of the company have declared that the company is able to pay off all the company's creditors in full. However, in our present case, s 224 clearly applies because the respondent company was wound up by this court. The respondent company was not a company in members voluntary winding up. The other law which clearly prohibit the money paid by purchasers to a housing developer from being garnished by creditors is sub-s (7) of s 7A of the Housing Developers (Control And Licensing) Act 1966:

> (7) Notwithstanding any other written law to the contrary, all monies in the Housing Development Account shall not be garnished until all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled.

[14] I have noted that the liquidator has prayed for an advocate and solicitor, namely 'Lee Poh Chin' to be permanently appointed by this court to assist him in carrying out his duties in the winding up of the respondent company. However, there was nothing in his affidavit to explain the need for this appointment or the credentials of this 'Lee Poh Chin'. It must be noted that the law allows a liquidator to instruct counsel or solicitors to advise or act for him as and when the need arises. Hence, I do not see the need for this permanent appointment as it will cause the respondent company to incur additional expenses unnecessarily.

[15] In conclusion, I make the following orders:

(1) Messrs TS Chong & Co must, within 14 days, provide the liquidator with a copy of all the banks fixed deposits receipts for the Stakeholders Sums as well as complete Statements of Account showing all fixed deposit interests received since they started acting as stakeholders;

(2) Messrs TS Chong & Co must pay, within 14 days, to the liquidator all the stakeholders sums that they received as stakeholders, together with all Fixed Deposit interests earned on those stakeholders sums;

(3) Messrs TS Chong & Co are to repay to the liquidator the fees that they deducted from the stakeholders sums or the Fixed Deposit interest, and they are to submit their bills for legal fees to the liquidator separately as a creditor of the respondent company;

(4) The liquidator is to collect all balance purchase monies from the purchasers of houses sold by the respondent company and to set up a special account similar to a housing development account to deposit all the balance purchase monies collected from these purchasers as well as the stakeholders sums;

(5) The monies in the special housing development account shall be utilised by the liquidator to pay expenses and professional fees directly related to the development of the houses sold to those purchasers and to pay his own fees to act as liquidator of the respondent company;

(6) The balance monies in the special housing development account at the end of the liquidation process are to be distributed pro-rata to purchasers who are entitled to liquidated damages for late delivery of their houses;

(7) The liquidator's application to appoint Lee Poh Chin to assist him is dismissed;

(8) Lastly, no order as to costs.

Order accordingly.

Reported by Sally Kee